

HR-82-005-RL  
7-1700-108-2

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

State of Minnesota, by Stephen W.  
Cooper, Commissioner, Minnesota  
Department of Human Rights, and  
his Predecessors,

Complainant,

ORDERS CREATING  
SPORTS AND HEALTH  
CLASS ACTION FUND

v.

Sports and Health Club, Inc.,  
Arthur W. Owens, Marc Crevier  
and Forest Larson,

Respondents.

WHEREAS, on January 8, 1988, Counsel for the Complainant,  
Special Assistant  
Attorney General Helen G. Rubenstein, filed a Motion with the  
Administrative Law Judge for an Order directing that all damages  
awarded with respect to individual Class Members be paid into a  
fund established by and under the control of the Office of the  
Attorney General; and

WHEREAS, the Respondents have not replied to the Motion noted  
in the preceding paragraph; and

WHEREAS, subsequent to the filing of the Motion, the  
undersigned Administrative Law Judge and Administrative Law Judge  
Janice K. Frankman have issued Orders awarding damages, penalties  
and costs totalling \$930,047 to Class Members and the State of  
Minnesota in the above-entitled matter; and

WHEREAS, Respondent Sports and Health Club, Inc. has filed a  
petition for bankruptcy, and discovery is ongoing in an attempt  
to ascertain the individual Respondents' ability to pay potential  
awards of damages, penalties and costs; and

WHEREAS, it is reasonable to conclude that the Respondents may  
not be able to pay all of the damages, penalties and costs  
awarded in this action; and

WHEREAS, it is the Administrative Law Judge's present  
understanding that, as of the date of these Orders, the  
Respondents have paid none of the damages, penalties and costs

awarded herein;

Based upon all of the proceedings herein, the Administrative Law Judge issues the following:

#### ORDERS

IT IS ORDERED that all damages, penalties and costs awarded with respect to individual Class Members in this matter, plus interest owing under Minn. Stat. 334.01, be paid into a Fund, nominated as the Sports and Health Class Action Fund, established by and under control of the Office of the Attorney General, to be distributed by the Attorney General in the following manner:

- a. If the full amount of damages awarded are collected or paid into the Fund, each Class Member will receive the amount awarded, plus interest on compensatory damages from the date of their award, calculated as provided in Minn. Stat. 334.01.
- b. After all Class Members have received the full amount of damages awarded, the remaining funds will be paid into the General Fund of the State of Minnesota up to the amount of any penalties and costs awarded to the Complainant. Any remaining funds will be paid to Class Members and Complainant as interest accrued from the time the individual Class Members' damage award or amount awarded to the Complainant is deposited in the Fund.
- c. If, after the Complainant undertakes all reasonable efforts to collect the damages awarded, an inadequate amount is available to pay each Class Member the full amount awarded, each Class Member will receive a pro rata share of the damages awarded to him or her. No funds will be distributed to the Complainant in satisfaction of penalties and costs awarded to the Complainant until each Class Member has received his or her full damage award.
- d. Distribution of available funds will be made no later than one year after final conclusion of the action, including all appeals. All amounts collected after the initial distribution will be distributed as sufficient funds are collected to make subsequent distributions reasonable.
- e. The Complainant will submit to the Administrative Law Judge reports regarding its collection efforts and the distribution of funds no less than one month before each distribution.

IT IS FURTHER ORDERED that all payments made pursuant to these Orders be remitted by the Office of the Attorney General to the Minnesota State Board of Investment, as escrow agent, for investment in the Treasurer's Cash Pool or a comparable fund.

Any income on the monies so escrowed and invested shall be

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added to the principal of the Sports and Health Class Action Fund for distribution in accordance with these Orders.

Dated this            day of December, 1989.

RICHARD C. LUIS  
Administrative Law Judge

#### MEMORANDUM

The Administrative Law Judge was initially reluctant to order establishment of a fund to be administered for the payment of damage awards in this action for two reasons -- (1) at the time of filing this Motion, no Orders awarding damages, penalties and costs had been issued, and (2) he was not persuaded that he possessed such authority. Counsel for the Complainant was directed to file with the Administrative Law Judge a Memorandum demonstrating that, in fact, he had the authority to direct the establishment of such a fund. After taking under advisement the Memorandum filed by Counsel for the Complainant, the Administrative Law Judge is persuaded that he has the requisite authority to issue the above Orders.

Minn. Rule 5000.1100, subp. 4 provides:

In the conduct of class actions, the administrative law judge may make appropriate orders: determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; requiring a specific type of notice or other protections for the members of the class or for the fair conduct of the action; dealing with other procedural matters. The orders may be altered or amended as may be desirable from time to time, and they are not final decisions of the department. (Emphasis supplied.)

This rule is analogous to the portions of Minnesota Rule of Civil Procedure 23.04 and Federal Rule of Civil Procedure 23(d), which provide, in relevant part:

In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent

undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner

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as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders . . . may be altered or amended as may be desirable from time to time. (Emphasis supplied.)

These rules provide trial judges with great latitude in controlling class actions, and ensuring that actions taken by class representatives benefit all class members. See 1 Herr & Haydock, Minnesota Practice, 23.17 at 462 (2d Ed., 1985).

In the case of *In re Agent Orange Product Liability Litigation*, 818 F.2d 179, 183 (2d Cir. 1987), the Court held:

The district judge . . . had discretion to adopt whatever distribution plan he determined to be in the best interests of the class as a whole.

See also, *Beecher v. Able*, 575 F.2d 1010, 1016 (2d Cir. 1978) and *Zients v. LaMorte*, 259 F.2d 628, 630 (2d Cir. 1972).

In a case such as this, where it appears that there may be insufficient funds to pay all of the damages, penalties and costs that have been awarded, the Federal Courts have authorized the creation of funds for collection of all available monies, which were to be allocated among eligible claimants at the Courts' discretion. *Curtiss-Wright Corp. v. Helfand*, 687 F.2d 171, 174 (7th Cir. 1982). In *Bush v. Rewald*, Fed. Sec. L. Rep., 92,999 (D. Ha. 1986), the Court explicitly approved as fair, adequate and reasonable a settlement which provided for a pro rata division of the available settlement fund among claimants based upon their respective unrecovered entitlements.

It is evident to the Administrative Law Judge, based on the above-noted authorities, that he is granted power (under Minn. Rule 5100.1100, subp. 4) in this case analogous to that possessed by trial judges to order the creation of a fund such as that proposed by the Office of Attorney General and Ordered herein. The Judge is mindful of his remarks to the parties at a Prehearing Conference early in this Class Action proceeding that

it should not be his objective to act as "paymaster" for all the qualifying Class Members, and Respondent Owens has properly called that statement to his attention. However, the Judge's duty to assure fair treatment for all Class Members is paramount. The Judge is persuaded that the Sports and Health Class Action Fund, to be administered by the Office of Attorney General on behalf of all qualifying Class Members, will serve to effectively discharge his duty while avoiding involvement in the mechanics of distribution of money.

R.C.L.

December 27, 1989

ALL COUNSEL AND PARTIES

Re: State of Minnesota, by Stephen W. Cooper, Commissioner,  
Minnesota Department of Human Rights, Complainant v. Sports  
and Health Club, Inc., Arthur W. Owens, Marc Crevier and  
Forest Larson, Respondents; OAH Docket No. HR-82-005-RL,  
7-1700-108-2.

Dear Counsel and Parties:

Enclosed and served upon you by mail, please find a copy of  
Orders Creating Sports and Health Class Action Fund in the  
above-entitled matter.

Very truly yours,

RICHARD C. LUIS  
Administrative Law Judge

RCL/lr

Telephone: 612/341-7610

Enclosure

cc: Richard L. Varco, Jr.  
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Sports and Health Club, Inc.  
Arthur Owens  
Marc Crevier  
Forest Larson

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FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

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Sports and Health Club, Inc.,  
Arthur W. Owens, Marc Crevier  
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Respondents.

ORDERS DENYING  
MOTION TO QUASH  
SUBPOENA

On April 21, 1988, a Motion was filed by counsel on behalf of Todd J. Owens, owner and proprietor of a business entity known as The Upholstery Shop, and on behalf of Gentry Stanley and Vicki (Owens) Stanley, owners and proprietors of an entity known as Peaceful Family Partnership, which Motion was for the Cancellation (Quashing) of a Subpoena issued on April 18, 1988 by the Chief Administrative Law Judge to the accounting firm of Froehling, Anderson, Plowman & Egnell, Ltd., Excelsior, Minnesota. Specifically, the Motion sought quashing of that portion of the subpoena requiring the production of documents, specified in Exhibit A of the subpoena, pertaining to the entities owned by the Movants, Peaceful Family Products and Todd Owens, d/b/a The Upholstery Shop.

On April 26, 1988, oral arguments were heard by the Administrative Law Judge at the Office of Administrative Hearings in Minneapolis. The Complainant was represented by Helen G. Rubenstein, Special Assistant Attorney General, Second Floor, Ford Building, 117 University Avenue, St. Paul, Minnesota 55155. The Movants were represented by Robert A. Nicklaus, Nicklaus Law Firm, P.O. Box 116, 103 West Second Street, Chaska, Minnesota 55318. Counsel filed Memoranda with the Administrative Law Judge on May 2 and May 8, 1988. The record in this matter closed on December 27, 1989.

After taking the Motion and arguments under advisement, and based upon all of the proceedings herein, the Administrative Law Judge makes the following:

#### ORDERS

1. That the April 21, 1988 Motion to Quash Subpoena issued to Froehling, Anderson, Plowman & Egnell, Ltd. on April 18, 1988 be and hereby is DENIED.

2. That Froehling, Anderson, Plowman & Egnell, Ltd. comply with the Subpoena issued by the Chief Administrative Law Judge on April 18, 1988, a copy of which is attached, on or before Friday, January 5, 1990, at 10:00 o'clock in the forenoon.

Dated this            day of December, 1989.

RICHARD C. LUIS  
Administrative Law Judge

Reported: Taped.  
Transcript Prepared by Jeffrey J. Watczak



# MEMORANDUM

The Motion to Quash Subpoenas has been denied because it was made by persons who have no standing to quash subpoenas issued by the Office of Administrative Hearings. Minn. Rule 1400.7000, subp. 3 provides that: "Any person served with a subpoena who has an objection to it may file an objection with the Judge . . ." (Emphasis supplied). According to the plain language of this rule, the Movants lack standing because they were not served with the subpoena. The accounting firm was properly served because the documents the Complainant is seeking are in its possession.

The Movants may not object to a subpoena served upon Froelhing, Anderson, Plowman & Egnell, Ltd. on the ground of privilege. First, such a motion is not theirs to make, it is the accounting firm's, because the firm is the entity served with the subpoena. Second, the firm has not objected to service of the subpoena. Third, there is no accountant-client privilege under Federal law, and none has been created in Minnesota. *United States v. Arthur Young & Company*, 465 U.S. 805, 817 (1984); *Couch v. United States*, 409 U.S. 322, 335 (1973). See Minn. Stat. 595.02. Because the information is not privileged, the Movants can assert no legal basis for objecting to compliance by their accounting firm with the subpoena. By providing the information to the firm, the Movants waived their right to object to Complainant's subpoena from the firm of documents containing information supplied by them.

Regarding the relevance of the information sought upon compliance with the subpoena, and the question of the propriety of discovering financial resources of the Respondents before entry of final judgment, the Administrative Law Judge has decided that the information is relevant and that it is appropriate to allow discovery of it now. The Judge is persuaded that the Respondents, particularly Arthur Owens, may be engaging in various artifices designed to transfer their assets. For instance, the Carver County District Court enjoined Owens from transferring stock in a closely-held real estate corporation controlled by him to a prospective "purchaser" because the Court viewed the transaction as a sham whereby Owens sought to disown himself from the primary source of revenue available to pay judgments against him. The Court's

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injunction was upheld on appeal. See *State by Cooper v. Sports and Health Club*, 438 N.W.2d 385 (Minn. 1989).

Although Todd Owens, proprietor of one of the entities moving to quash the subpoena, testified that all monies paid to The Upholstery Shop by Sports and Health were for services performed by his business, the Administrative Law Judge is persuaded that the Complainant has the right to see if records held by the accounting firm employed by the Upholstery Shop and Peaceful Family Products can substantiate the unsupported testimony. The same reasoning applies to the records of Peaceful

Family Products, an entity for which Respondents Owens and Crevier allegedly performed services compensable by salary or wages. The Complainant has a right to ascertain if the Respondents, particularly Owens, are attempting to secrete assets of theirs by transferring them to entities such as those owned by the Movants, which are entities controlled by Owens's children. There is ample precedent to believe that such may be the case. The subpoena is designed to lead to a discovery of that relevant information, so it should be enforced.

R.C.L.

December 28, 1989

ALL COUNSEL AND PARTIES

Re: State of Minnesota, by Stephen W. Cooper, Commissioner,  
Minnesota Department of Human Rights, Complainant v. Sports  
and Health Club, Inc., Arthur W. Owens, Marc Crevier and  
Forest Larson, Respondents; OAH Docket No. HR-82-005-RL,  
7-1700-108-2.

Dear Counsel and Parties:

Enclosed and served upon you by mail, please find a copy of  
Orders Denying Motion to Quash Subpoena in the above-entitled  
matter.

Very truly yours,

RICHARD C. LUIS  
Administrative Law Judge

RCL/lr

Telephone: 612/341-7610

Enclosure

cc: Richard L. Varco, Jr.  
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Arthur Owens  
Marc Crevier  
Forest Larson  
Robert A. Nicklaus

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